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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 540

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,
Petitioner,

vs.

LINE MATERIALS INDUSTRIES, a division of McGraw-Edison Company, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No.....

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,
Petitioner,

vs.

LINE MATERIALS INDUSTRIES, a division of McGraw-Edison Company, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on May 25, 1964.

OPINION BELOW

The opinion of the Court of Appeals is officially reported in 332 F.2d 393 (10th Cir. 1964). It is appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1964 (Tr. 3); petition for rehearing was denied June 29, 1964 (Tr. 6). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner, the statutory performing surety of the prime contractor on a Rural Electrification Association (R.E.A.) construction project, was not entitled to a priority to contract funds as against the contractor's assignee of such funds, the assignee having furnished neither labor nor materials to the job and the contractor becoming insolvent?

2. Whether the aforesaid assignment by the contractor which contributed to his eventual insolvency and which was not made for a fair consideration, was not a fraudulent conveyance as to his performing surety?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved, all of which are set forth in Appendix B, are:

28 U.S.C. 1254 (1)

41 U.S.C. 54.1 (c)(2)—Standard bond forms required on government agency's contracts

Secs. 50-14-1 through 50-14-13, N.M. Stat. Ann. (1953) —Uniform Fradulant Conveyance Act.

STATEMENT

This petition seeks from this Court, once more, a review of a Tenth Circuit decision and, eventually, a direction to that court to prefer a performing surety over an insolvent contractor's assignee of construction funds. On a similar surety question, *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed. 2d 190, decided in 1962, this Court did not agree with prior decisions of the Tenth Circuit. The principles expressed in the *Pearlman* decision require another review of this same Circuit's act — an act which would appear to extinguish the light lit by this Court's *Pearlman* decision.

Petitioner is a nationally known surety company with its main office in Pennsylvania. It wrote the required statutory bond for an individual contractor building an R.E.A. project in the State of New Mexico. Respondent was merely an antecedent creditor of a separate corporation in which the contractor had an interest. Respondent had nothing to do with the construction project for which the bond was written. It was not an obligee under the bond; nor was it even a creditor of Petitioner's principal. The money involved, some $22,000, came from the Government.

Petitioner, who had to complete the R.E.A. project upon the contractor's insolvency, sought to recover his portion of the contract funds which the contractor, acting in his capacity as an officer of his corporation, had assigned to one of the corporate creditors, in partial payment of the corporation's $160,000 debt to Respondent. This creditor was a corporation doing business in New Mexico, and suit by the Petitioner was instituted in the United

States District Court of New Mexico. The complaint, in substance, alleged two causes of action: (1) that the assignment of the construction funds to the Respondent by Petitioner's principal was invalid for lack of any consideration, was made without any corporate authority, and that petitioner's rights to the funds were superior to the Respondent's on the general grounds of subrogation (R. 4-5); and (2) an alternative cause of action, seeking to impose a trust upon such funds on the general grounds that the assignment to the Respondent constituted a fraudulent conveyance in law (R.5-6). All the facts were stipulated and uncontroverted (R. 13-15, Ex. 1, 2, A, E, F, & G, R. 11, 16-20).

These facts establish that Petitioner issued four payment and performance bonds to "Joseph Bassick, an individual doing business as Utilities Service Company," a prime contractor of four public projects (Stipulated Fact 2, R. 13; Pl. Ex. 1, R. 6-9).

The bond that is principally involved in this action covered the "Garkane" job, the R.E.A. cooperative, and was issued by the Petitioner on August 29, 1959 (R. 13). In December 1959, without notice to the Petitioner, Mr. Bassick, as an individual, assigned to Respondent the final payment due from Garkane on a job being performed by *Utilities Service Company*, his alter ego (Ex. A, R. 11-12). This payment was to apply on indebtedness of *Electric City Supply Company, Inc.* to Respondent. Electric City was a public corporation, and not a family corporation, of which Bassick was an officer. (Stipulated Facts 4-5, R. 14).

The Respondent had knowledge that the Garkane bond was in existence prior to the execution of the assignment (Stipulated Fact 9, R. 14).

In February, 1960, Bassick paid the sum of $22,161.16 to Respondent by check drawn on the account of Electric City Supply Company (Stipulated Fact 11, R. 15). Mr. Bassick commingled his individual funds and the various corporate funds (Stipulated Fact 10, R. 15); but there is no question that the check, which was introduced into evidence, clearly identified these funds paid to Respondent as from the Garkane project (Pl.'s Ex. 2, R. 47). Additionally, Respondent admitted that the funds it received arose from the bonded Garkane job (Answer, R. 10), and were not funds earned by *its debtor*, Electric City Supply Co. (Stipulated Fact 11, R. 15).

Utilities Service Co. defaulted on its four bonds, and as a result the Petitioner, American Casualty Company, suffered the following losses:

Garkane Power Association (Bond date Aug. 29, 1959)	$10,997.98
Mid-State Electric Cooperative, Inc. (Bond date Dec. 14, 1959)	$25,084.29
USA-Yellowstone (Bond date Aug. 31, 1959)	$53,882.41
Wells Rural Electric Cooperative (Bond date January 29, 1960)	123,230.06
Total	$213,194.74

(Stipulated Fact 6, R. 14)

Respondent never sold Utilities Service Company a single item for any of its Government projects (Stipulated Fact 12, R. 15). The record further discloses that at the time of the assignment, Electric City Supply Company

owed Respondent $160,000 on a long past due account (Stipulated Fact No. 8, R. 14), and still owed $100,000 a year after the payment in dispute was made (Pl. Ex. G, R. 20).

Upon the joint statement of facts submitted by counsel (R. 13-15), attached to which were copies of the assignment given by American Surety's principal to Respondent (R. 11-12), the Garkane contract (Exhibit F, R. 20), Respondent's account with Electric City Supply Company, and Garkane's payment schedules and checks (Exhibit G, R. 20), judgment was entered on July 9, 1963 dismissing Petitioner's claim, the trial court finding that Petitioner was not entitled to the relief sought because there had been no proof of Bassick's default or insolvency at the date of assignment (R. 26).

Petitioner appealed to the Circuit Court of Appeals, and the trial court's judgment was affirmed (Tr. 3).

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals that a non-job creditor's assignment prevailed over the surety's claim is contrary to the law as expressed by a most recent pronouncement of this Court, *Pearlman v. Reliance Insurance Company*, and is contrary to the consistent principles espoused by this Court from the *Henningsen* to the *Pearlman* cases, all as bound together in the *Pearlman* decision.

2. The error of the Court of Appeals in holding that there were insufficient badges of fraud to constitute a fraudulent conveyance is so wrong as to deserve a review.

ARGUMENT

1. The Petitioner's right to the money is superior to Respondent's.

The trial court denied Petitioner's claim upon the grounds that the money had been paid to and assigned by the eventually defunct contractor prior to any proof of his default or insolvency (R. 25-26). The decision was affirmed on the same grounds (Tr. 3), the Court of Appeals further declaring that upon payment to the contractor, the money became his to dispose of as he saw fit.

But neither the trial nor appellate court gave consideration to the admitted fact that the assignment was made to one who had contributed absolutely nothing to the Government job; to one who had no contractual relationship whatever with the entity which earned the contract funds; to one who took the assignment with knowledge of both the principal's shaky financial condition and Petitioner's legal right of subrogation.

The question of a surety's rights to retained funds has been before this Court on many occasions, e.g., *Prairie State Bank v. United States*, 164 U.S. 227, 41 L.Ed. 412, 17 S.Ct. 142 (1896); *Henningsen v. U.S. F. & G.*, 208 U.S. 404, 52 L. Ed. 547, 28 S.Ct. 389 (1908); *United States v. Munsey Trust Co.*, 332 U.S. 234, 91 L.Ed. 2022, 67 S.Ct. 1599 (1947). The surety has always prevailed. Most recently, in *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 83 S.Ct. 232, 9 L.Ed. 2d 190 (1962), the surety's priority over general creditors (represented by a trustee in bankruptcy), was firmly established.

The theory that has pervaded this favorable attitude towards the surety has been this Court's practical realiza-

tion that payment and performance bonds are required on Government contracts to assure, on the one hand, that all laborers and materialmen will be compensated for their efforts in completing Government projects — on the other, that the Government will emerge with a completed contract. For these reasons, the surety which has guaranteed payment to the persons who actually perform the labor and supply the materials, and has guaranteed completion to the Government, has traditionally been held to have a superior claim to the contract money, *that right relating back to the date of the bond. Prairie State Bank v. United States,* supra; *National Surety Corp. v. United States,* 133 F. Supp. 381 (Ct. Cl. 1955), (cert. den. 350 U.S. 902). The bond was written in August 1959; the clandestine assignment not until December 1959.

The history and rationale of the necessity for payment and performance bonds were illuminated by Judge Medina, writing for the Second Circuit in *In re Dutcher Constr. Corp.*, 298 F.2d 655, 656 (2nd Cir. 1962) (sub nom. *Pearlman*), where it was also said:

> "All parties agree that the surety is subrogated to the rights of laborers and materialmen. What this entitles the surety to is hornbook law and is set forth in Osborne, Suretyship (1955) at page 20, 'It***entitles the surety to enjoy any priority that the creditor enjoyed. . . . The only question in this case, and the decisive one, is — were the laborers and materialmen entitled to a priority in the $87,737.35 [the sum paid to the trustee for general creditors]?"

Pearlman confirmed Judge Medina's observations, 371 U.S. at 141.

Admittedly, the funds in the instant caes had been

paid out. Respondent characterized them as progress payments. If that characterization destroys Petitioner's superior right (and *Martin v. National Surety Company*, 85 F. 2d 135 (8th Cir. 1936) (aff'd 300 U.S. 588, 51 L.Ed. 822, 57 S.Ct. 531) and *American Surety Co. v. Bethlehem Bank*, 314 U.S. 314, 86 L.Ed. 241, 62 S.Ct. 226 (1941), indicate otherwise), Petitioner submits that the very language of the assignment assuring the assignee that the *final payment* on a *contract performed*, was being assigned (Par. 5, Ex. A, R. 11-12) demolishes the "progress payment" dream of Respondent. Respondent *knew* it was Utility Service Company's final payment, upon which laborers and materialmen had "first call." *Newark Ins. Co. v. United States*, 181 F. Supp. 246, 248 (Ct. Cl. 1960).

Permeating the transaction, however, are the additional factors:

(a) Respondent was not a creditor, nor a laborer, nor a materialman, of the contractor; Respondent's debt was owed by a completely alien corporation (Stipulated Facts 8, 12, R. 14-15).

(b) Respondent knew that funds of Petitioner's principal were being assigned to pay the debt of an alien corporation (Stipulated Facts 9, 11, R. 14-15).

(c) Respondent further knew that Petitioner's principal was unable to meet his current debts, and that Petitioner had a well established equitable right of subrogation to the contract funds (Stipulated Findings 8, 9, R. 14).

Surely these facts constitute the basis for recognizing the surety's equitable ownership in the money on behalf of laborers and materialmen, as well as on behalf of the owner, until the obligation of the contractor to both per-

form and pay were fulfilled, which equities were superior to any property right of the contractor or the contractor's assignee. As Justice Black observed in *Pearlman*:

> ". . . If the surety . . . was . . . the equitable owner of this fund, or had an equitable lien or *prior right to it*, this property interest of the surety never became a part of the bankruptcy estate [here, the principal's "free money," Opinion, p. 7, Tr. 3]. . . ."
> (Emphasis added)
>
> 371 U.S. at 136.

Did not this Court mean that the money never became the unqualified property of the contractor at all? One cannot assign what one does not own, or, at least, the assignment carries with it all prior equities. So said Justice Black.

There can be no argument that contract funds are first committed to the payment of contract expenses. *Newark Ins. Co. v. U.S.*, 181 F. Supp. 246 (Ct. Cl. 1960). Had they been applied, in this case, to the expenses of the job rather than to the debts of a stranger, it is undeniable that the surety would not have been required to perform and pay under its bond (Stipulated Fact 6, R. 14).

If the principal had been in default at the time the assignment was made, the Circuit Court would have had no difficulty in finding the assignment inferior to American Surety's claim (Opinion pp. 6-7, Tr. 3). When the default is materially occasioned by the assignment, by what legal logic should a distinction be made? Petitioner certainly was wrapped in the cloak of equitable protection from the moment the bond was executed. *Prairie State Bank v. United States*, supra; *National Surety Corp. v. U.S.*, 133 F. Supp. 381 (Ct. Cl. 1955) (cert. den. 350 U.S.

902); *United States Fidelity & Guaranty Co. v. Sweeney*, 80 F. 2d 235 (8th Cir. 1935). Furthermore, as the court observed in *Massachusetts Bonding & Ins. Co. v. State of New York*, 259 F. 2d 33, 37-38 (2d Cir. 1958), the contractor's failure here to promptly pay its bills *is* a default.

The position of this Petitioner differs in no material manner from that of the trustee in *Pearlman*. There, this Court ordered the trustee to disgorge to the surety. There, the trustee represented creditors of the bankrupt. Here, Respondent, too, is a creditor — but even further removed than was the trustee. It was not even a creditor of Petitioner's principal.

We urge the importance of this Court resolving the issue of priorities between a Government contractor's assignee and his surety. If the principles of a surety's equitable subrogation, and equitable priority, and relation back, are to have any validity, the decision below surely fogs those principles, and surely conflicts with the equities which have always been recognized by this Court in similar cases. *Pearlman* would descend to a lowly orbit.

2. The error of the Court of Appeals in holding that there were insufficient badges of fraud to constitute a fraudulent conveyance is so wrong as to deserve a review.

We have outlined above the facts of this transaction, showing that both transferror and transferee knew of Petitioner's contingent claim to contract funds; that Respondent was aware of its grantee's inability to pay his debts at the time of taking the assignment; that Respondent knew the assignment included funds not owned by its debtor.

Considering these facts, and the further acknowledgement that the assignment was not to *satisfy* an antecedent debt, but was procured for the express purpose of inducing forbearance of suit (R. 11), it is difficult to imagine a situation that would more aptly fit the provisions of the Uniform Fraudulent Conveyance Act (Appendix B). The appellate court felt there were insufficient badges of fraud to set aside the conveyance (Op. p. 9, Tr. 3).

(*A*) The Uniform Act, §4, requires *only* a showing that fair consideration was not given, and that the grantor be made insolvent thereby. *Ned J. Bowman Co. v. White*, 13 Utah 2d 173, 369 P. 2d 962 (1962).

The consideration was stipulated (R. 14). It was to induce forbearance to sue, and was not "*satisfaction* of an antecedent debt," or any other consideration as defined by the statute. *Aycock v. Ft. Branch Milling Co.*, 182 Ala. 326, 62 So. 94 (1913). It did not "extinguish" or "discharge" Bassick's debt. *Bamberger v. Schoolfield*, 160 U.S. 149, 16 S.Ct. 225, 40 L.Ed. 374 (1895); *Klein v. Hoffheimer*, 132 U.S. 367, 10 S.Ct. 130, 33 L.Ed. 373 (1889).

Not only was Bassick unable to meet his debts as they matured, as Respondent's own account will attest, it is obvious that he was made insolvent, to the detriment of Petitioner alone in the sum of more than $200,000 (Stipulated Fact 6, R. 14).

Section 4 of the Uniform Act *requires* a finding of a fraudulent conveyance.

(*B*) Under §5 of the Act, if the grantor has unreason-

ably small capital remaining to continue his business, and there has been no fair consideration, the conveyance is fraudulent regardless of either party's intent to hinder, delay, or defraud. *First State Bank of Mobeetie v. Goodner*, 168 S.W.2d 941 (Tex. Civ. App. 1943).

Bassick's remaining capital was insufficient to even pay the balance of Respondent's claim. It was further so much depleted that this Petitioner had to complete three additional government contract jobs under its bonds. The record will not permit any other conclusion than that he was left with "unreasonably small capital."

And still — no fair consideration, as *defined* under the statute.

(*C*) Section 7 of the Act provides that if the conveyance was made with intent to hinder, delay, or defraud creditors, that intent, in and of itself, renders the conveyance fraudulent.

The language of the assignment that all labor and material costs had been paid and that the contract had been performed, together with assignee's admission of knowledge of the bonds, certainly would support the strong suspicion that both parties intended for the surety to be left holding the bag when the wholly foreseeable default ultimately occurred.

A century ago, this Court pinpointed the crucial element in determining whether a conveyance was fraudulent as to creditors:

> "Every case depends on its circumstances, and *is to be carefully scrutinized*. But the vital question

is always the good faith of the transaction. There is no other test." (Emphasis added.)

Lloyd v. Fulton, 91 U.S. 479, 485, 23 L.Ed. 363 (1875).

"Good faith" here is noticeably lacking. Respondent was aware of a bond by which, *as a matter of law*, Petitioner's prior subrogation rights were secured. Bassick, better than anyone else, knew that he was barely treading water financially and that the Petitioner would soon be called upon to complete four of his government jobs, at a cost of more than $200,000.

In effect, it was a finding of fraudulent conveyance of contract funds that permitted the surety to recover in *Massachusetts Bonding & Ins. Co. v. New York*, 259 F. 2d 33 (2d Cir. 1958).

The Uniform Fraudulent Conveyance Act was designed to close those few loopholes grabbed at by "clever" manipulators. Petitioner is entitled to its protection.

CONCLUSION

The surety guaranteed to pay the laborers and materialmen for the fruits of their endeavors — and it did pay. It guaranteed that the job would be completed — and it was completed. By reason of

(a) Subrogation to the rights of the owner in the contract fund to see to its proper application, *or*

(b) Subrogation to the rights of laborers and materialmen in a fund created by their efforts, *or*

(c) The conspiracy of grantor and-or grantee to defraud the surety of its equitable right to the contract funds,

it is urged that the decision of the Court of Appeals is contrary to the law enunciated by this Court. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — Opinion

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7451 — April Term, 1964

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,
Appellant,

vs.

LINE MATERIALS INDUSTRIES, a division of McGraw-Edison Company, a corporation,
Appellee.

Appeal from the United States District Court for the District of New Mexico.

[Filed May 25, 1964]

Mary C. Walters (McAtee, Toulouse, Marchiondo, Ruud & Gallagher on the brief) for Appellant;

Owen B. Marron of Marron & Houk for Appellee.

Before Breitenstein, Hill and Seth, United States Circuit Judges.

Hill, Circuit Judge.

This action was brought in the court below by the appellant, American Casualty Company, to recover from the appellee, Line Materials Industries, a sum of money paid to it on February 12, 1960. Judgment was entered dismissing the complaint and this appeal resulted.

The facts were stipulated and may be summarized as follows: On August 29, 1959, the appellant surety company, through one of its agents, issued a performance and payment bond to Joseph Bassick, a general contractor doing business as Utilities Service Company. This bond was issued in connection with the performance of a construction contract Bassick had entered into with Garkane Power Association, which provided for the construction of electric power lines. Thereafter and on August 31, 1959, December 14, 1959, and January 30, 1960, the appellant surety company, through the same agent, issued three more performance and payment bonds to Bassick, each of which covered a particular construction project that he had undertaken. During this same period of time, Bassick was also the president of Electric City Supply Company, Inc., a public corporation which had no connection with any of the four construction projects covered by the four surety bonds. It was indebted to appellee, but none of such indebtedness was owed by Bassick either as an individual or under his trade name, Utilities Service Company. Electric City was being pressed for payment of the obligation and, on December 23, 1959, Bassick, individually, executed and delivered to appellee an instrument denominated "Assignment and Declaration of Trust" for the purpose of inducing appellee to forbear enforcement of its claim against Electric City. By this instrument, Bassick obligated himself to apply upon the indebtedness owed by Electric City to appellee certain sums of money that

were due or would become due and owing to him, including the remaining balance which would be payable on the Garkane contract. At the time this instrument was executed and delivered, appellee had knowledge of the existence of the surety bond issued by appellant on the Garkane project.

On February 5, 1960, a payment was made by Garkane to Bassick and, pursuant to the forbearance agreement, he paid the sum of $22,161.16 to appellee on February 12, 1960. It should be noted here that there is no evidence in the record to show that on or prior to February 12, there was any default on the part of Bassick as to the Garkane or any of the other three contracts covered by appellant's surety bonds. Similarly, there is no evidence which would establish that, on or prior to that date, appellant had asserted any claim to the unpaid balance due on the Garkane contract.

Bassick did default on all four of the contracts and the appellant surety company was compelled to complete the jobs at a cost of $213,194.74, which includes $10,997.98 on the Garkane project. When it was not reimbursed for these losses, appellant commenced this action to recover the $22,161.16 payment made to appellee alleging that it had a superior right to that sum by equitable subrogation and that appellee held the sum in trust for it by virtue of its superior right.

Appellant contends that, as a completing or paying surety, it has a superior right, by equitable subrogation, to the funds paid by its principal to appellee and that it is entitled to follow those funds into the hands of appellee and impose a trust upon them. Its argument is that, as a subrogee, it is entitled to the contract funds as against

any mere assignee of the funds and that this right of subrogation relates back to the date of the execution of the bond. It also appears to argue that, as a subrogee, it is entitled to all of the remedies of the creditors of its principal and has the right to set aside conveyances made by its principal in payment of the debts of a stranger, i.e., Electric City.

It is, of course, true that where a surety on a contractor's bond is required to complete the contract or pay the debts of its principal upon his default, the surety is entitled to reimbursement for the funds expended or the payments made and, to enforce the right to be reimbursed, it becomes subrogated to the rights of the person it paid and these rights are superior to those of a mere assignee where unpaid contract funds are involved.[1] It is also true that the right of subrogation relates back to the date of execution of the bond.[2] Also, there is authority for the proposition that laborers and materialmen have an equitable right to payment from funds due a contractor on a public improvement in preference to general creditors and that when a surety pays such claims it is subrogated to their rights and is entitled to recover from the funds in preference to any assignment of the funds by the contractor.[3]

The trouble is those rules have no application to the

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[1]Pearlman v. Reliance Insurance Co., 371 U.S. 132; United States v. Munsey Trust Company, 332 U.S. 234; Henningsen v. United States Fidelity & Guaranty Co., 208 U.S. 404; Prairie State National Bank v. United States, 164 U.S. 227; National Surety Corporation v. United States, 133 F. Supp. 381 (Ct. Cl. 1955), cert. denied, 350 U.S. 902.

[2]Prairie State National Bank v. United States, supra; National Surety Corporation v. United States, supra.

[3]Martin v. National Surety Co., 8 Cir., 85 F.2d 135, aff'd, 300 U.S. 588; United States Fidelity & Guaranty Co. v. Sweeney, 8 Cir., 80 F. 2d 235; United States Fidelity & Guaranty Co. v. City of Bristow, 4 F.2d 810 (E.D. Okla. 1925).

factual situation presently before us. In each of the cited cases where they were applied, the unpaid contract funds had been either actually withheld and were still in the hands of the other party to the contract or were in the possession of a court, or had been paid to a creditor of the contractor at a time when the creditor had full knowledge that the contractor was in default and his surety was asserting a claim to such funds. None of these situations are present here. Moreover, it is implicitly recognized in each of the cited cases that the rights of subrogation, even as against a bare assignment without actual payment, extend only to the amount of money unpaid on the contract at the time the contractor defaults and a dispute arises concerning that money. In other words, there is a clear distinction between the right to subrogation, which exists from the date the bond is executed, and actually being subrogated, which occurs when payments are made upon the principal's default.

This is simply a case where the owner of a project paid a sum of money due on the contract to the contractor at a time when the contractor was not in default. It was free money and the contractor had the right to use it in any way he chose without it being subject to any claim or equity of his surety.[4] Bassick did use it to pay an obligation that did not arise from his performance of the contract in question. But, he had a legal right to do so as the appellant surety company, at that time, was not subrogated to the rights of anyone concerned with the contract and had no valid claim to the money.

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[4]Kane v. First Nat. Bank of El Paso, Tex., 5 Cir., 56 F.2d 534, 85 A.L.R. 362, cert. denied sub nom., Kane v. Pottoroff, 287 U.S. 603; Fidelity & Deposit Co. v. Union State Bank, 21 F.2d 102; Ohio Casualty Ins. Co. v. Colorado Portland Cement Co., 97 Colo. 541, 51 P.2d 591.

The rule applicable here is succinctly stated in 4 Corbin on Contracts, § 901, p. 609: "As long as the contractor has committed no vital breach, he has a right to payments as provided in the contract; and his assignee will have as good a right to these payments as did the contractor. As long as the contractor is performing as agreed, the owner must pay as agreed; and the surety has no right, by subrogation, that the payments shall be withheld. After breach by the contractor, the situation changes."

Appellant seeks to set aside the payment made from Bassick to appellee by invoking the New Mexico Uniform Fraudulent Conveyance Act.[5] But, this action was not brought on the theory of a fraudulent conveyance. There is no allegation or proof of the essential elements of a fraudulent conveyance such as intent to hinder, delay or defraud or insolvency on the part of Bassick.[6] Nor is there any allegation or sufficient proof of the commonly accepted badges of fraud such as would establish a fraudulent conveyance.[7]

AFFIRMED.

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[5]N. Mex. Stat. Annot. 1953, §50-14-1 et seq.
[6]N. Mex. Stat. Annot. 1953, §§50-14-4, 50-14-7.
[7]Royal Indemnity Company v. McClendon, 64 N.M. 46, 323 P.2d 1090.

APPENDIX B

28 U.S.C. 1254(1):

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

41 U.S.C. 54.1(c)(2):

Except as otherwise authorized, the following standard forms shall be used without deviation by all executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them:

• • •

(c)(2) U.S. Standard Form No. 25-A, approved by the Secretary of the Treasury September 16, 1935, or U.S. Standard Forms Nos. 25-C, 25-C1, and 25-C3, approved by the Secretary of the Treasury May 29, 1941, whenever a payment bond under the act of August 24, 1935, 49 Stat. 793, is required.

Uniform Fraudulent Conveyance Act, New Mexico Statutes Annotated (1953 compilation):

"50-14-1. Definition of terms. — In this act (50-14-1 to 50-14-13):

A. 'Assets' of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

B. 'Conveyance' includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.

C. 'Creditor' is a person having any claim, whether matured, or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

D. 'Debt' includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"50-14-2. Insolvency. — A. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

B. In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner; Provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

"50-14-3. Fair consideration. — Fair consideration is given for property, or obligation:

A. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

B. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained.

"50-14-4. Conveyances by insolvent. — Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

"50-14-5. Conveyances by persons in business. — Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

"50-14-6. Conveyance by a person about to incur debts. — Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

"50-14-7. Conveyance made with intent to defraud. — Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either

present or future creditors is fraudulent as to both present and future creditors.

"50-14-8. Conveyance of partnership property. — Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred:

A. To a partner, whether with or without a promise by him to pay partnership debts, or

B. To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

"50-14-9. Rights of creditors whose claims have matured. — Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser:

A. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or.

B. Disregard the conveyance and attach or levy execution upon the property conveyed.

A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

"50-14-10. Rights of creditors whose claims have

not matured. — Where a conveyance made or an obligation incurred is fraudulent as to a creditor whose claim has not matured, he 'may proceed' in a court of competent jurisdiction against any person whom he could have proceeded had his claim matured, and the court may:

A. Restrain the defendant from disposing of his property;

B. Appoint a receiver to take charge of the property;

C. Set aside the conveyance or annul the obligation, or

D. Make any order which the circumstances of the case may require.

"50-14-11. Cases not provided for in act. — In any case not provided for in this act (50-14-1 to 50-14-13) the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

"50-14-12. Construction of act. — This act (50-14-1 to 50-14-13) shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

"50-14-13. Short title. — This act (50-14-1 to 50-14-13) may be cited as the 'Uniform Fraudulent Conveyance Act.'"